

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY RAY HAMMER,

Defendant.

NO: 1:14-CR-2007-TOR

ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR CORRECT
SENTENCE UNDER 28 U.S.C. § 2255

BEFORE THE COURT is Defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 43). Defendant is proceeding *pro se*. Assistant United States Attorney Shawn N. Anderson represents the United States. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, the Court denies Defendant's Motion.

//

//

//

ORDER DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT
SENTENCE UNDER 28 U.S.C. § 2255 ~ 1

BACKGROUND

On June 7, 2013, Defendant Anthony Ray Hammer was arrested in Selah, Washington following a report that he discharged a firearm at another person. The Selah Police Department, in its search incident to Defendant's arrest, found a Beretta 92 FS 9 mm semi-automatic pistol in Defendant's waistband, which contained 12 rounds of ammunition. The Bureau of Alcohol, Tobacco, Firearms, and Explosives determined that the firearm and ammunition were manufactured outside of the State of Washington and thus had previously traveled in or affected interstate and/or foreign commerce. At the time of the incident, Defendant had four prior felony convictions, all under Wash. Rev. Code § 46.61.024.¹ Following his arrest and receipt of *Miranda* warnings, Defendant told the police he knew he was not allowed to possess a gun.

In January 2014, the United States filed a Complaint, and shortly thereafter an Indictment, with this Court, charging Defendant with Felon in Possession of Firearm, 18 U.S.C. § 922(g)(1). On February 11, 2014, a Grand Jury returned a Superseding Indictment against Defendant, charging him with Possession of a

¹ Attempt to Elude, Yakima County Superior Court, No. 97-1-01891-4; Attempt to Elude, Yakima County Superior Court, No. 00-1-01751-6; Attempt to Elude, Yakima County Superior Court, No. 03-1-00834-1; Attempt to Elude, Yakima County Superior Court, No. 08-1-02440-2.

1 Firearm and Ammunition by a Prohibited Person in violation of 18 U.S.C.
2 §§ 922(g)(1) and 924(e).

3 Defendant entered into a written plea agreement and pled guilty to this
4 charge on March 12, 2014, pursuant to Fed. R. Crim. P. 11(c)(1)(C). ECF No. 32.
5 In his plea agreement, Defendant acknowledged that he had been previously
6 convicted of four felony offenses in Washington and was subject to the statutory
7 penalties under the Armed Career Criminal Act (“ACCA”). The statutory
8 penalties under the ACCA included a term of imprisonment of not less than fifteen
9 years and a maximum of life.²

10 This Court sentenced Defendant on June 24, 2014. ECF No. 41. The Court
11 imposed a 180-month term of imprisonment, 3 years of supervised release, a
12 \$1,000 fine, and a \$100 special assessment, which was consistent with the parties’
13 Rule 11(c)(1)(C) agreement. *Id.* By accepting the plea agreement, Defendant
14 waived all rights to appeal, including his right to file any post-conviction motion
15 attacking his conviction and sentence. ECF No. 32 at 11. Specifically, Defendant
16 waived the right to bring motions pursuant to 28 U.S.C. § 2255, “except one based

17 ² The presentence investigation report, which also documented Defendant’s prior
18 felony convictions, calculated a guideline sentencing range of 168 to 210 months,
19 subject to a statutory mandatory minimum of 180 months of imprisonment. ECF
20 No. 37.

1 upon ineffective assistance of counsel based on information not then known by
2 Defendant and which, in the exercise of due diligence, could not be known by
3 Defendant by the time the Court imposes the sentence.” *Id.*

4 In the instant motion, Defendant moves to vacate, set aside, or correct his
5 sentence based on a claim of ineffective assistance of counsel. ECF No. 43.

6 DISCUSSION

7 A. Motion to Vacate

8 A defendant in criminal proceedings has a constitutional right to effective
9 assistance of counsel. U.S. Const. amend. VI. A convicted defendant asserting
10 violation of his constitutional right to effective assistance of counsel must
11 demonstrate the following: (1) “that counsel’s representation fell below an
12 objective standard of reasonableness,” and (2) “that there exists a reasonable
13 probability that, but for counsel’s unprofessional errors, the result of the
14 proceeding would have been different.” *Kimmelman v. Morrison*, 477 U.S. 365,
15 374, 375 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).
16 To satisfy this standard, a defendant must show that counsel’s representation was
17 “outside the wide range of professionally competent assistance” and that there is a
18 “probability sufficient to undermine confidence in the outcome.” *Hart v. Gomez*,
19 174 F.3d 1067, 1069 (9th Cir. 1999). “Judicial scrutiny of counsel’s performance
20 must be highly deferential.” *Strickland*, 466 at 689.

1 Defendant moves the Court to set aside or correct his conviction based on a
2 claim of ineffective assistance of counsel. According to Defendant, counsel
3 informed Defendant he would be facing a term of imprisonment ranging from 15
4 years to life under the ACCA but would get a life sentence when convicted if he
5 did not enter into the plea agreement. ECF No. 43-1 at 4. Defendant contends that
6 his sentence should not be subject to the ACCA. *Id.* at 6. Specifically, Defendant
7 contends three of his four prior convictions were under the pre-2003 version of
8 Washington's Attempting to Elude Police statute, Wash. Rev. Code § 46.61.024,
9 and thus do not meet the definition of a "violent felony" under the ACCA. ECF
10 No. 46 at 1 (citing *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008)). As
11 such, Defendant asserts his counsel's representation fell below the standard of
12 reasonableness when she advised Defendant to "take the deal" sentencing him to
13 15 years in federal prison even though the maximum sentence without application
14 of the ACCA would be 10 years. *Id.* at 5-6.

15 1. Waiver of Right to Appeal

16 As an initial matter, this Court finds Defendant waived his right to file the
17 instant motion. Although Defendant bases his motion on a claim of ineffective
18 assistance of counsel, his motion provides no information that was not available to
19 Defendant before his sentencing. The exception to waiver contained in his plea
20 agreement only includes motions based upon ineffective counsel "based on

1 information *not then known by Defendant and which, in the exercise of due*
2 *diligence, could not be known by Defendant* by the time the Court imposed the
3 sentence.” ECF No. 32 at 11 (emphasis added). Both the plea agreement and
4 presentence investigation report put Defendant on notice of the significance of his
5 prior felony convictions, and he acknowledged the impact of these prior
6 convictions before the Court imposed his current sentence. Therefore, the Court
7 finds Defendant waived the right to file this appeal.

8 2. Violent Felony Under the ACCA

9 Even considering the substance of Defendant’s motion proves futile in light
10 of the Supreme Court’s recent opinion in *Sykes v. United States*, 131 S. Ct. 2267
11 (2011). Although Defendant relies on *United State v. Jennings*, 515 F.3d 980 (9th
12 Cir. 2008), to assert that his prior convictions—three of which were under the
13 previous version of Washington’s Attempting to Elude statute—were not violent
14 felonies under the ACCA, this Court is bound by the Supreme Court’s reasoning in
15 *Sykes*.

16 The ACCA defines a violent felony as “any crime punishable by
17 imprisonment for a term exceeding one year . . . that (i) has as an element of use,
18 attempted use, or threatened use of physical force against the person of another; or
19 (ii) is burglary, arson, or extortion, . . . or *otherwise involves conduct that presents*
20 *a serious potential risk of physical injury to the person of another.*” 18 U.S.C.

1 § 924(e)(2)(B) (emphasis added). If the ACCA does not apply, the ordinary
2 maximum sentence for a convicted felon in unlawful possession of a firearm is 10
3 years of imprisonment. *Id.* § 924(a)(2). However, if the ACCA does apply—that
4 is, the defendant has three prior “violent felony” convictions—an armed defendant
5 is subject to the 15-year mandatory minimum prison term imposed by the Act. *Id.*
6 § 924(e).

7 The Ninth Circuit, in *United States v. Jennings*, analyzed whether a
8 conviction under the pre-2003 version of Washington’s Attempting to Elude
9 statute should be characterized as a violent felony under the catchall portion of the
10 ACCA’s definition. 515 F.3d 980. Washington’s pre-2003 version of the statute
11 read as follows:

12 Any driver of a motor vehicle who willfully fails or refuses to
13 immediately bring his vehicle to a stop and who drives his vehicle in a
14 manner indicating a wanton or willful disregard for the lives or
15 property of others while attempting to elude a pursuing police vehicle,
16 after being give a visual or audible signal to bring the vehicle to a
17 stop, shall be guilt of a class C felony.

18 Wash. Rev. Code § 46.61.024 (2002). The Ninth Circuit concluded that a
19 conviction under this statute does not constitute a violent felony under the ACCA
20 because the statute does not require proof of any actual or potential risk of harm to
another for conviction: “Washington’s attempting to elude a pursuing police
vehicle statute ‘is missing an element of the generic crime’—here, the actual or

1 potential risk of harm to another—‘altogether.’” *Jennings*, 515 F.3d at 993
2 (quoting *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007)).
3 Because a perpetrator could be convicted under the Washington statute for conduct
4 that “indicat[es] a wanton disregard for the . . . property of others,” that is, conduct
5 that does not present a potential risk of harm to the *lives* of others, the Ninth
6 Circuit declined to categorize a conviction under the statute as a violent felony.
7 *See id.* at 989 n.9.

8 The Washington legislature subsequently amended Wash. Rev. Code
9 § 46.61.024 in 2003. The current version reads as follows:

10 Any driver of a motor vehicle who willfully fails or refuses to
11 immediately bring his or her vehicle to a stop and who drives his or
12 her vehicle in a reckless manner while attempting to elude a pursuing
police vehicle, after being given a visual or audible signal to bring the
vehicle to a stop, shall be guilty of a class C felony.

13 Wash. Rev. Code § 46.61.024 (2010) (omitting previous language requiring proof
14 of “a wanton or wilful disregard for the lives or property of others”).

15 Neither Washington’s pre-2003 statute, nor its current version have any of
16 the elements set forth in 18 U.S.C. § 924(e)(2)(B)(i), nor is it one of the crimes
17 enumerated in section 924(e)(2)(B)(ii). Accordingly, the issue is whether both
18 versions of the statute satisfy the ACCA’s catchall definition of violent felony
19 under section 924(e)(2)(B)(ii), which characterizes conduct “that presents a serious
20 potential risk of physical injury to the person of another” as a violent felony.

1 Although the Ninth Circuit directly addressed this issue with regards to the pre-
2 2003 version of the statute, its decision in *Jennings* was without the benefit of the
3 Supreme Court’s reasoning in *Sykes v. United States*, 131 S.Ct. 2267 (2011)—
4 controlling precedent to which this Court is bound.

5 In *Sykes*, the Supreme Court analyzed whether Indiana’s Resisting Law
6 Enforcement statute constituted a violent felony for purposes of the ACCA. 131
7 S.Ct. 2267. In granting certiorari, the Court aimed to settle a circuit split, which
8 included the tension created by the Ninth Circuit’s opinion in *Jennings*, regarding
9 whether vehicle flight is a violent felony under the ACCA. *Id.* at 2272. Under
10 Indiana law, the following conduct constitutes violation of the vehicle flight
11 statute:

12 (a) A person who knowingly or intentionally . . . (3) flees from a law
13 enforcement officer after the officer has, by visible or audible means,
14 identified himself and ordered the person to stop; commits resisting
law enforcement, a Class A misdemeanor, except as provided in
subsection (b).

15 (b) The offense under subsection (a) is a: (1) Class D felony if: (A) the
16 offense is described in subsection (a)(3) and the person uses a vehicle
17 to commit the offense; or (B) while committing any offense described
18 in subsection (a), the person draws or uses a deadly weapon, inflicts
bodily injury on another person, or operates a vehicle in a manner that
creates a substantial risk of bodily injury to another person.

19 Ind. Code. § 35-44-3-3 (2004). The Supreme Court concluded that because vehicle
20 flight, as defined in Indiana’s statute, “presents a serious potential risk of physical

1 injury to another,” it is a violent felony for purposes of the ACCA. *Id.* at 2273,
2 2277. The Court discussed the inherent risk of injury presented when a perpetrator
3 attempts to elude a pursuing officer, determining that such conduct posed a serious
4 potential risk of injury:

5 When a perpetrator defies a law enforcement command by fleeing in a
6 car, the determination to elude capture makes a lack of concern for the
7 safety of property and persons of pedestrians and other drivers an
8 inherent part of the offense. Even if the criminal attempting to elude
9 capture drives without going at full speed or going the wrong way, he
creates the possibility that police will, in a legitimate and lawful
manner, exceed or almost match his speed or use force to bring him
within their custody. A perpetrator's indifference to these collateral
consequences has violent—even lethal—potential for others.

10 *Id.* at 2273. The Court’s acknowledgement of the “collateral consequences” of
11 vehicle flight encompassed not only the danger posed to property, pedestrians, and
12 other drivers, but also the danger posed to police officers pursuing the fleeing
13 perpetrator. *Id.* at 2273-74.

14 The attempt to elude capture is a direct challenge to an officer’s
15 authority. It is a provocative and dangerous act that dares, and in a
16 typical case requires, the officer to give chase. The felon’s conduct
17 gives the officer reason to believe that the defendant has something
18 more serious than a traffic violation to hide. . . . Because an accepted
19 way to restrain a driver who poses dangers to others is through
20 seizure, officers pursuing fleeing drivers may deem themselves duty
bound to escalate their response to ensure the felon is apprehended . . .
And once the pursued vehicle is stopped, it is sometimes necessary for
officers to approach with guns drawn to effect arrest. *Confrontation
with police is the expected result of vehicle flight. It places property
and persons at serious risk of injury.*

1 *Id.* (emphasis added) (citation omitted). The Supreme Court went on to compare
2 the risk of violence associated with vehicle flight to that of burglary and arson,
3 noting that both burglary and arson—crimes enumerated under the ACCA’s
4 violent felony definition—pose less statistical risk than vehicle pursuits. *Id.* at
5 2274-75. Accordingly, the Court concluded that vehicle flight is properly
6 characterized as a violent felony under the ACCA’s residual clause. *Id.* at 2277.

7 The Supreme Court’s reasoning in *Sykes*, when applied to both the pre-2003
8 and current versions of Washington’s Attempting to Elude statute, commands but
9 one conclusion: attempting to elude a police officer in violation of Wash. Rev.
10 Code § 46.61.024 is a violent felony under the ACCA because of the serious risk
11 posed not only to pedestrians and other drivers, but also to pursuing police officers
12 who may engage in a violent confrontation with the fleeing perpetrator. Although
13 the Court in *Jennings* envisioned a conviction under the pre-2003 statute which
14 would pose a risk of harm only to property, not the life of another, 515 F.3d at 989
15 n. 9, the Supreme Court in *Sykes* emphasized the risk of serious injury a typical
16 incident of vehicle flight not only poses to property, pedestrians, other drivers, but
17 also pursuing police officers, 131 S.Ct. at 2273-74. Washington’s pre-2003
18 Attempting to Elude statute, as well as its current version and the Indiana statute
19 analyzed in *Sykes*, all expressly include this element of “elud[ing]” or “flee[ing]”
20 from law enforcement, which the Supreme Court determined presents the risk of

1 violent confrontation and thus serious potential risk of injury to another. Indeed,
2 the Supreme Court's decision in *United States v. James*, 550 U.S. 192 (2007), cited
3 in *Sykes*, reasoned that "the proper inquiry is whether the conduct encompassed by
4 the elements of the offense, in the ordinary case, presents a serious potential *risk* of
5 injury to another," not whether there's a "metaphysical certainty" that someone
6 will be injured. *Id.* at 207-08 (emphasis added). "As long as an offense is of a
7 type that, by its nature, presents a serious potential risk of injury to another, it
8 satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision." *Id.* at 209.

9 The Tenth Circuit, in line with the Supreme Court's reasoning in *Sykes*,
10 concluded that a conviction under the current version of Wash. Rev. Code.
11 § 46.61.024 constitutes a violent felony under the ACCA's residual clause. *United*
12 *State v. Denson*, 488 Fed. App'x 314, 320-21 (10th Cir. 2012) (discussing the
13 danger vehicle flight poses to the safety of property, pedestrians, other drivers, as
14 well as the pursuing police officers). Although the Ninth Circuit has not yet
15 expressed its view on whether the current version of Washington's Attempting to
16 Elude statute constitutes a violent felony under the ACCA, its recent line of cases
17 following *Sykes* suggests that it would reach the same conclusion as that of the
18 Tenth Circuit. *See United States v. Martinez*, 771 F.3d 672 (9th Cir. 2014)
19 (holding that a conviction for vehicle flight from a pursuing officer under
20 California Vehicle Code § 2800.2 constitutes a violent felony under the ACCA's

1 residual clause); *United State v. Snyder*, 643 F.3d 694 (9th Cir. 2011) (holding that
2 a conviction for felony attempt to elude police under Oregon Revised Statute
3 § 811.540(1) constitutes a violent felony under the ACCA’s residual clause).
4 Indeed, the most recent Ninth Circuit opinion discussing the definition of violent
5 felony under the ACCA highlighted the reasoning in *Sykes* that “vehicle flight
6 from police inherently poses a serious potential risk to the safety of pedestrians and
7 other drivers, *as well as a risk of violent confrontation with police.*” *Martinez*, 771
8 F.3d at 676 (emphasis added).

9 At the time of Defendant’s sentencing, he had four prior convictions of
10 Attempting to Elude Pursuing Police Vehicle under Washington State law, three of
11 which were under the pre-2003 version of the statute. Pursuant to the Supreme
12 Court’s reasoning in *Sykes*, as well as recent Ninth and Tenth Circuit opinions
13 following *Sykes*, each of these prior convictions qualifies as a violent felony under
14 the ACCA. By attempting to elude pursuing officers in violation of Wash. Rev.
15 Code. § 46.61.024, Defendant’s conduct “present[ed] a serious potential risk of
16 physical injury to the person of another.” Even under the previous version of the
17 statute, the risk of serious physical injury to the pursuing officer—a risk posed by
18 the nature of the offense, *see James*, 550 U.S. at 207-08—is sufficient to bring
19 Defendant’s convictions within the reach of the ACCA’s definition of violent
20 felony. Thus, because all four of Defendant’s prior convictions under Wash. Rev.

1 Code § 46.61.024 presented a serious risk of injury to the pursuing police officer—
2 if not also a serious risk of injury to pedestrians and other drivers—they are all
3 properly categorized as violent felonies under the ACCA.

4 Accordingly, Defendant’s four prior convictions were properly characterized
5 as violent felonies under the ACCA in his Presentence Investigation Report and
6 plea agreement, and the ultimate sentence imposed was appropriate given the
7 ACCA’s mandatory statutory term of imprisonment. Consequently, defense
8 counsel’s advisement that Defendant accept the plea agreement, which provided a
9 sentence in line with the ACCA’s minimum mandatory 15-year prison term, did
10 not fall “outside the wide range of professionally competent assistance,” nor is
11 there a “probability sufficient to undermine confidence” in the ultimate sentence
12 imposed. *See Hart v. Gomez*, 174 at 1069. Accordingly, because Defendant has
13 failed to demonstrate ineffective assistance of counsel, his Motion (ECF No. 43) is
14 **DENIED.**

15 **B. Certificate of Appealability**

16 A petitioner seeking post-conviction relief may appeal a district court's
17 dismissal of the court’s final order in a proceeding under 28 U.S.C. § 2255 only
18 after obtaining a certificate of appealability (“COA”) from a district or circuit
19 judge. 28 U.S.C. § 2253(c)(1)(B). A COA may issue only where the applicant has
20 made “a substantial showing of the denial of a constitutional right.” *See id.*

§ 2253(c)(2). To satisfy this standard, the applicant must “show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted).

The Court concludes that Defendant is not entitled to a COA because he has not demonstrated that jurists of reason could disagree with the Court's resolution of his constitutional claim or conclude the issue presented deserves encouragement to proceed further.

ACCORDINGLY, IT IS HEREBY ORDERED:

Defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 43) is **DENIED**.

The District Court Executive is hereby directed to enter this Order and furnish copies to the parties. The Court further certifies that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). This file and the corresponding civil file shall be **CLOSED**.

DATED February 3, 2015.



Thomas O. Rice
THOMAS O. RICE
United States District Judge